DIAMOND PEAK SDN BHD

v.

UNITED MERCHANT FINANCE BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: P-02-668-1999]
6 FEBRUARY 2003

LAND LAW: *Sale of land - Order for - Sale by way of auction - Failure to state date of auction in order - Whether order rendered invalid - Section 257 of National Land Code and Practice Note No. 2 of 1987 - Whether subsequent order for sale could cure irregularity*

LAND LAW: *Charge - Order for sale - Application for - Date of affidavit in support of originating summons - Whether calculation of amount owed should correspond to date of application - Whether discrepancy as to dates a breach of O. 83 r. 3(3)(c) & 3(6) of Rules of the High Court 1980*

The respondent had commenced a charge action by an originating summons dated 20 March 1986 to recover moneys owed by the appellant. It also sought to sell, by way of a public auction, the land charged by the appellant to recover the outstanding amount. On 22 September 1986, the High Court granted the respondent's application ('the first order'). However, the trial judge did not state the date as to when the auction was to be held. Subsequently, the senior assistant registrar ('SAR') ordered the auction be held on 1 July 1987 but it did not materialise. On 16 August 1988 the trial judge, based upon the respondent's application, made another order ('the second order') for the auction to be held on 20 January 1989. When the sale was unsuccessful, the SAR from time to time proceeded to fix new dates for the auction. On 3 April 1997, the appellant applied to the High Court, *inter alia*, to set aside the first order and other orders made thereafter. The trial judge dismissed the appellant's application with costs. The appellant appealed to this court against the said decision.

Held:
Per Abdul Kadir Sulaiman JCA

[1] The first order did not conform with the mandatory requirements of s. 257 of the National Land Code ('NLC') in that the trial judge had failed to specify the auction date a month from the date of its pronouncement. Therefore, the said order was rendered invalid. The first order could not be cured by the second order, albeit, the latter did conform with Practice Note No. 2 of 1987, when in between the issuance of the said orders the SAR had fixed the date of auction without authority. (p 14 d-e)

[2] Counsel for the respondent could not rely upon the slip rule under O. 20 r. 1 of the Rules of the High Court 1980 ('RHC') in the present case. This rule only applied to where there were clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission. (p 16 b-c)

[2a] Order 92 r. 4 of the RHC allows the court to invoke its inherent powers to make such orders necessary to prevent injustice or an abuse of the court process. However, in the present case, enforcing the first order would in effect be unjust to the appellant in relation to the disposal of its vested right in the said property subject to the charge. To be fair to both parties, the respondent could submit a fresh application to secure a proper order for sale in compliance with s. 257 of the NLC. (p 16 e-i)

[3] The respondent failed to comply with O. 83 r. 3(3)(c) and 3(6) of the RHC by which it was required to state, in the originating summons and the affidavit, the amount of interest or instalments in arrears as at their date of issue. The figures given by the respondent here related to the amount owed as at 17 January 1986 with interest due thereafter whereas its originating summons was dated 20 March 1986. (p 17 f-h)

[Appeal allowed with costs; order for sale set aside.]

*[**Bahasa Translation** Of Headnotes*

Responden telah memulakan tindakan gadaian melalui saman pemula pada 20 Mac 1986 untuk mendapatkan semula hutangnya dari perayu. Ia juga telah memohon untuk penjualan tanah yang digadaikan oleh perayu, melalui lelongan awam untuk mendapatkan semula jumlah wang yang tertunggak. Pada 22 September 1986, Mahkamah Tinggi telah membenarkan permohonan responden ('perintah pertama'). Walau bagaimanapun, hakim bicara tidak menyatakan tarikh untuk lelongan itu dijalankan. Sejurus kemudian, penolong kanan

pendaftar ('PKP') telah memerintahkan bahawa lelongan tersebut diadakan pada 1 Julai 1987 tetapi ia tidak terjadi. Pada 16 Ogos 1988, atas permohonan responden, hakim bicara telah memerintahkan lelongan tersebut dijalankan pada 20 Januari 1989 ('perintah kedua'). Bila jualan berkenaan tidak terjadi, PKP telah meneruskan penetapan tarikh untuk lelongan awam dari masa ke semasa. Pada 3 April 1997, perayu telah membuat permohonan ke Mahkamah Tinggi untuk mengetepikan perintah pertama dan perintah-perintah berikutnya. Hakim bicara telah menolak permohonannya dengan kos. Perayu membuat rayuan ke mahkamah ini terhadap keputusan tersebut.

Diputuskan:

Oleh Abdul Kadir Sulaiman HMR

[1] Perintah pertama telah mengingkari kehendak mandatori s. 257 Kanun Tanah Negara ('KTN') bilamana hakim bicara gagal menyatakan tarikh lelongan awam sebulan dari tarikh ia diputuskan. Oleh itu, perintah tersebut tidak terpakai. Ketidaklengkapan perintah pertama tidak dapat dibetulkan oleh perintah kedua walaupun perintah terkemudian itu mematuhi Nota Arahan No 2 Tahun 1987 kemudiannya, oleh kerana PKP di antara tarikh perintah pertama dan perintah kedua, telah menetapkan tarikh-tarikh lelongan tanpa kuasa yang sah.

[2] Peguam responden tidak boleh berharap kepada kaedah khilaf di bawah A. 20 k. 1 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dalam kes ini. Kaedah ini hanya terpakai di mana terdapat kesilapan perkeranian dalam penghakiman atau perintah, atau kesilapan penghakiman atau perintah yang diakibatkan oleh peninggalan atau kekhilafan yang tidak disengajakan.

[2a] Aturan 92 k. 4 KMT membenarkan mahkamah menggunapakai kuasa sedia-adanya dalam membuat apa-apa perintah yang perlu untuk mengelakkan ketidakadilan atau salah-guna tatacara mahkamah. Akan tetapi, adalah tidak adil kepada perayu untuk menguatkuasakan perintah pertama dalam kes ini berhubung dengan kepentingan terletakhaknya dalam hartanah yang digadaikan. Untuk berlaku adil kepada kedua-belah pihak, responden boleh membuat permohonan baru untuk mendapatkan satu perintah jual sempurna yang mematuhi s. 257 KTN.

[3] Responden gagal mematuhi A. 83 k. 3(3)(c) dan 3(6) KMT dimana ia sepatutnya menyatakan jumlah bunga atau ansuran tunggakan pada tarikh saman pemula dan afidavit dibuat. Penyata yang diberikan oleh responden menunjukkan jumlah hutang dengan bunganya pada 17 Januari 1986 manakala saman pemulanya bertarikh 20 Mac 1986.

Rayuan dibenarkan dengan kos; perintah jual diketepikan.]

Case(s) referred to:
Citibank v. Ibrahim Othman [1994] 1 MLJ 608 HC ***(refd)***
Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 FC ***(refd)***
Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd [1999] 1 CLJ 810 HC ***(refd)***
Perwira Affin Bank Bhd v. Tan Tian Ser [1995] 2 CLJ 133 HC ***(refd)***

Legislation referred to:
National Land Code, s. 257(1)(b)
Rules of the High Court 1980, O. 20 r. 11, O. 83 r. 3(3)(c), (6), (7), O. 92 r. 4

Other source(s) referred to:
Practice Note No. 2 of 1987

For the appellant - Mohindas Singh (Harjit Singh); M/s Kek Ooi & Lee Hong
For the respondent - Toh Lee Hong (Kek Boon Wei); M/s Harjit Singh Sangay & Co

Reported by M Maheswaran

JUDGMENT

Abdul Kadir Sulaiman JCA:
This is an appeal against the decision of the learned judge of the High Court of 10 August 1999 dismissing the application of the appellant/chargor, of 3 April 1997 to have the order for sale of his charged land of 22 September 1986 and other consequential orders made thereon in favour of the respondent/chargee be set aside; and that all execution proceedings thereat be stayed pending the outcome of the application.

The application of the respondent of 20 March 1986 in the charge action sought to recover the outstanding sum together with overdue interest due and owing by the appellant as at 17 January 1986 amounting to RM1,821,855.82 with further interest to be calculated from 18 January 1986 till date of payment. Also the application sought the liberty to sell by public auction the said charged land with consequent directions with a view to recover the outstanding amount.

The said application was supported by the affidavit of Goh Cheng Bee, its Assistant General Manager, Operations Division affirmed also on 20 March 1986. On 18 September 1986, Choo Teow Meng, the respondent's General Manager affirmed a supplementary affidavit making reference to the first affidavit of 20 March 1986 and gave the outstanding balance of money due and owing by the appellant on the said charge as at 22 September 1986 amounting to RM2,019,900.61 inclusive of interest with further overdue interest to be calculated from 23 September 1986 till date of full settlement.

By an order dated 22 September 1986, the learned judge granted the application of the respondent on the outstanding sum due and owing by the appellant of RM2,018,860.61 "as at the date of this Order and further overdue interest will

be calculated from 23 September 1986 till date of payment". It was also ordered that the respondent be at liberty to sell the said land by public auction which "shall be held on a date to be fixed but such date shall not be less than one (1) month after the date on which the Order hereon is made", with further usual consequential orders.

Upon the application of the respondent made by way of summons for directions of 20 February 1987, the learned senior assistant registrar ("the SAR") on 22 April 1987 made the following orders, *inter alia*, that the date of the auction be fixed on 1 July 1987 at 10.30am at the compound of the High Court, Penang.

Then by summons in chambers of 22 June 1988, the respondent applied for the following orders:

> (1) that the date of the auction be fixed pursuant to the Order of this Honourable Court for the sale of the abovenamed properties made on the 22nd day of September, 1986;
>
> (2) such further order as the Court may deem fit and expedient.

It's unclear however, as to what happened to the date of auction fixed by the SAR earlier to be on 1 July 1987. However, based on the affidavit in support of the above summons in chambers, affirmed by Lai Fong Yee, the assistant general manager, credit and marketing division of the respondent affirmed on 20 June 1988, the summons was on account of the requirements of Practice Note No. 2 of 1987 that the auction date shall have to be fixed by the judge under s. 257(1)(b) of the National Land Code 1965. It is to be noted that as at the date of the order of 22 September 1986 the aforesaid Practice Note was not yet in existence.

In consequent of the aforesaid summons in chambers of the respondent, the learned judge on 16 August 1988 made the following order:

> that the auction is fixed on 20th day of January 1989 pursuant to the Order of this Honourable Court for the sale of the abovenamed properties made on the 22nd day of September, 1986.

As the sale was not successful, by various consequential orders, the SAR from time to time fixed new dates for the auction which the last of such order on record was made on 10 July 1991 fixing the auction date on 7 August 1991.

Then, after a lapse of about six years, by a summons in chambers of 3 April 1997 accompanied by a certificate of urgency, the appellant/chargor applied for the following relief:

(a) that the order of court made on 22nd September 1986 and other consequential orders made thereon be set aside;

(b) that all execution proceedings be stayed pending the final decision on the present application.

This application of the appellant is supported by the affidavit of Tan Chong Keat, a director of the appellant, affirmed on 3 April 1997. The gist of the affidavit is that it questions the contents of the originating summons of the respondent and its supporting affidavit, both of 20 March 1986 mentioned earlier, which is for an order for sale of the charged land, resulting in the order of the learned judge of 22 September 1986. It is said that the two documents do not comply with the requirements of O. 83 r. 3(3)(c) and (6) of the RHC. Consequently, the order of 22 September 1986 is of no effect and ought to be set aside *ex debito justitiae.* Further Form 16D was not served on the appellant in accordance with the requirements of the NLC. Following that by a further affidavit affirmed on 31 March 1999 by Harjit Singh a/l Harbans Singh, solicitor for the appellant, it was further averred that the said order of 22 September 1996 infringed s. 257(1)(b) of the NLC, thereby making the order invalid.

After hearing the application of the appellant of 3 April 1997, the learned judge by an order of 10 August 1999 dismissed the said application with costs. Hence this appeal now before us. On 8 January 2001 we allowed the appeal with costs here and below. We also directed that the deposit be refunded to the appellant and we set aside the order for sale of 22 September 1986. We now provide the reasons for allowing the appeal.

The requirements of s. 257 of the NLC is clear as pointed out by the then Federal Court in *Maimunah bte Megat Montak v. Mayban Finance Berhad* [1996] 3 CLJ 9. In that case, the land was ordered to be sold by public auction. But contrary to the requirements of s. 257(1)(b) the order had not fixed the auction date. At p. 11 the court said:

> At the conclusion of the argument, we were unanimously of the opinion, that the provisions of s. 257(1)(a) to (d) were mandatory, and as the order for sale in the present case had suffered from the defects herebefore mentioned, it was thereby invalidated.

Similarly, in this case before the learned judge and which is now before us, the first order for sale of 22 September 1986 did not stipulate the auction date but merely left such date to be fixed later. However, the different situation exists here in that by a second order of 16 August 1988, (that too after the SAR on a summons for direction had fixed the auction date to be on 1 July 1987), the learned judge fixed the auction date to be 20 January 1989.

Section 257(1) in as far as it is material to this appeal states as follows:

> Matters to be dealt with by order for sale
>
> (1) Every order for sale made by the Court under section 256 shall:
>
> (a) ...;
>
> (b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;
>
> (c) ...;
>
> (d) ... .

As pointed out earlier, the Federal Court held that the provisions of s. 257(1) inclusive of sub-subs. (b), is mandatory. Its failure to comply with these mandatory provisions may result in the order for sale made be invalidated.

Taking the position, therefore, the order of the learned judge of 22 September 1986 is clearly not in conformity with the mandatory requirements of s. 257, and therefore, it is clearly an invalid order. This invalid order cannot be cured by a subsequent order of 16 August 1988, given some two years later, albeit in conformity with Practice Note No. 2 of 1987, when in fact in between the period, the learned SAR upon a summons for direction had without authority fixed the date of auction to be 1 July 1987 along with other consequential orders leading to the disposal of the said properties by auction sale. What if before the subsequent order of 16 August 1988, relying on the invalid order of the SAR of 1 July 1987 the said properties were sold off? They are clearly transactions of an illegal nature and cannot therefore be legalised by a subsequent order of the learned judge of 16 August 1988. It makes no difference for the fact that the said properties were not sold in between.

In our view, the said Practice Note No. 2 is nothing more than a notice to those concerned as to the mandatory requirements of s. 257(1) of the NLC in that, *inter alia*, every order for sale must be made by a judge of the High Court and that the order for sale so made shall specify therein a date not less than one month after the date of the order on which date a sale by public auction would be held. Therefore, if an order for sale does not provide a date for the auction sale, that order cannot be a valid order as it runs foul of s. 257(b) of the NLC. The order having been perfected, cannot be supplemented by a subsequent order specifying the date for the auction sale, to render an invalid order into a valid one.

We considered the case of *Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd* [1999] 1 CLJ 810 brought to our attention by the learned counsel for the respondent in an attempt to save the two orders of the learned judge of 22 September 1986 and 16 August 1988, respectively. A similar situation occurred in that case where upon the application by the chargor for the sale of the charged property be held on a date not less than one month from the date of the order for sale without mentioning any specific date, the learned judge there ordered in terms of the prayer without mentioning a specified date in the order for sale made. Subsequently, by a separate application the chargor applied for a date of the auction sale of the property. One of the issues before the court in that subsequent application was whether such an order for sale made without specifying the date of the auction sale, in breach of an express provision of the NLC, may be corrected by amendment pursuant to the slip rule or pursuant to the inherent jurisdiction of the court.

Before the learned judge, the counsel conceded that the accidental omission of the date for sale in the first application for sale was solely and wholly attributable to his inadvertence. On this the learned judge said at p. 814:

> The issue next arises whether such an order that has been made in breach of s. 257(1)(b) of the NLC ought to be set aside or whether it can also be corrected by way of an application.
>
> Can the order be corrected?
>
> Once it is apparent that to give effect to the order for sale it is pertinent that the specific date be given, and that such was not done when the order for sale was made on 11 March 1998, I am of the view that I ought to be able to correct the said order either under the slip rule, or under the inherent jurisdiction of the court to cure the invalid order for sale.

So applying the present matter before us to what the learned judge in *Oriental Bank Bhd*'s case, *supra*, has said, if he was right in his view, the present appeal by the appellant would fail for the reason that before this application for setting aside, the respondent had obtained the order of 16 August 1988 stipulating the date of the auction sale of the properties.

The learned judge in *Oriental Bank Bhd* said at p. 817:

> Having read the originating summons and the eventual order for sale, I am convinced that at all material times the plaintiff intended that the court do specify a date for the sale of the charged property by auction, such date being a date not less than one month from the date of the order for sale. There was clearly an oversight and an accidental slip or omission on the part of counsel to request for a specific date. Further, I am satisfied that had the issue

> of the specific date of the sale been brought up before me on the hearing of the originating summons on 11 March 1998, I would have no hesitation in specifying the date for the sale. I may also add that even if an oral application had been made on that date to amend the application to include a prayer for a specific date for the sale, I would have been minded to grant such an order.

With all respect to the learned judge, we cannot share his view on the matter. We are of the view that the slip rule provided by O. 20 r. 11 of the RHC cannot be applied to rectify the invalid order of 22 September 1986 in our present case. Slip rule applies only in respect of clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission. Accidental slip or omission on the part of counsel appearing before a court of law cannot attract the provision of O. 20 r. 11 of the RHC. In our case, it cannot come under "clerical mistakes in judgment or orders" of the court. The order was clear and unambiguous in that the learned judge expressly ordered "that such sale by public auction shall be held on a date to be fixed" though with a qualification that "such date shall not be less than one (1) month after the date on which the Order hereon is made". The intention of the court in making such an order is clear in the face of the mandatory provisions of s. 257(1)(b) of the NLC when he made the order in that fashion without stipulating the date for the auction sale in the order. The learned SAR took it from there by subsequently fixing for the High Court judge the necessary date which under the NLC such a power is not with him to do so.

On the inherent powers of the court, O. 92 r. 4 of the RHC provides as follows:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Such inherent powers given to the court are not powers to be so used indiscriminately. They relate only to powers "to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court". There is no question of preventing an abuse of the process of the court in our instant case. On the question of preventing injustice, we too are of the view that if accepting the supplemental order of 16 August 1988 to cure the injustice done to the respondent, by validating the invalid order of 22 September 1986, we are in fact creating an injustice to the appellant by changing their position in relation to the disposal of their vested right in the said properties the subject matter of the charge. To provide justice in the matter to both sides the respondent could easily come back to the court for a fresh application for an order for sale with the hope of getting a proper order for sale in compliance with s. 257 of the NLC.

Next, on the issue of non-compliance with O. 83 rr. 3(3)(c) and (6) of the RHC. The relevant Rule state as follows:

> 3(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the charger and chargee with particulars of:
>
> (a) ...
>
> (b) ...
>
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit;
>
> (d) ...
>
> (6) where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable **and give the particulars mentioned in paragraph (3)**.
>
> (7) Where the plaintiff's claim includes a claim for interest to judgment, **the affidavit must state the amount of a day's interest.** (emphasis added).

The originating summons of the respondent of 20 March 1986 concerns claim by the respondent under para. (6) of O. 83 r. 3 of the RHC. By the said paragraph, the respondent is required to satisfy the requirements in para. (3)(c) thereof in that the originating summons and the affidavit must state the amount of any interest or instalments in arrear as at the date of the issue of the originating summons and the date of the affidavit. Apart from that, para. (7) needs also to be complied with, though here the appellant did not specifically raise it as an issue.

The originating summons in this case was issued and the affidavit in support was dated on 20 March 1986 respectively. However, the figures given in the summons and the affidavit relate to the outstanding sum together with overdue interest due and owing by the appellant to the respondent as at 17 January 1986 with further interest to be calculated from 18 January 1986 till date of full payment, and not the position as at 20 March 1986 as so required by para. (6) read with para. (3)(c) of O. 83 r. 3 of the RHC. The affidavit fails to state the amount of a day's interest as so required by para. (7) thereof. There was, however, a supplementary affidavit affirmed by the general manager of the respondent dated 18 September 1986. But the position of the outstanding balance of money due and owing by the appellant to the respondent on the said charge given was as at 22 September 1986 which failed to cure the defect in non-compliance with the necessary paragraphs earlier mentioned.

On this issue, the learned judge in his judgment stated at p. 6 as follows:

> In the present case, the charge action begun by originating summons was not an action for the delivery of possession or payments of moneys secured or both. It was an action for an order for the sale of the charged property, an altogether dissimilar and distinct relief not regulated by rr. 2 and 3 – see Order 83 r. 1(4). Then, it ought not to have been contended that Order 83 r. 3(3)(c) read together with r. 3(6) was not followed. Indeed, even if O. 83 rr. 3(3)(c) and 3(6) regulated the instant charge action (ie, *Citibank v. Ibrahim bin Othman* [1994] 1 MLJ 608 is truly to be preferred over *Perwira Affin Bank Berhad v. Tan Tian Ser* [1995] 2 CLJ 133), it ought not to have been so contended, as the affidavits clearly showed the amount of the interest in arrear (in the instant case of a fixed loan repayable on demand, the amount of instalments in arrear was not applicable) at the date of the affidavits, and at the date on which the order for sale was made. Ineluctably, the Plaintiff stated the exact amount that the Defendant was legally liable to pay to stave off the sought auction sale.

In giving preference to *Citibank*'s case, *supra*, over *Perwira Affin Bank Berhad*'s case, *supra*, the learned judge must be referring to the *dicta* of Edgar Joseph Jr. FCJ in *Maimunah bte Megat Montak, supra*, at p. 11 thereof, where the Federal Court preferred the reasoning and conclusion of Shankar J in *Citibank*. But the learned judge in so concluding in the above passage has misconstrued the decision in *Citibank* and misapplied it in the present matter before him. In *Citibank*, the bank applied for an order for sale of the defendant's land in order to effect payment of moneys secured by the charge of the land (which is the case here before the learned judge). The defendant claimed that the plaintiff had failed to provide the statutory particulars required under O. 83 r. 3 of the RHC. The plaintiff however contended that O. 83 r. 3 only applied to a claim for delivery of possession and, as that was a foreclosure action, O. 83 r. 3 did not apply. Shankar J disagreed with the contention of the plaintiff but agreed with the contention of the defendant and accordingly dismissed the application of the plaintiff. In the present case, the respondent clearly has failed to comply with the mandatory requirements of O. 83 r. 3(3)(c) and 3(6) of the RHC as enumerated above. On this ground too we were of the view that this appellant's appeal ought to be allowed.